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Nos. 88-1623, 88-6952, 88-6953, and 88-724

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. DELIERE, PETITIONER
v.
UNITED STATES OF AMERICA

THOMAS K. DOHERTY, PETITIONER
v.
UNITED STATES OF AMERICA

NELSON E. BARNER, PETITIONER
v.
UNITED STATES OF AMERICA

NICHOLAS SALERNO, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that references to "intangible rights" fraud in the indictment and the jury instructions did not require the reversal of petitioners' convictions.

2. Whether the evidence was sufficient to sustain Doherty's and Salerno's convictions for conspiracy to commit mail fraud.

3. Whether the evidence was sufficient to sustain Doherty's conviction for racketeering.

4. Whether the district court erred in admitting evidence seized from Doherty's residence.

5. Whether the district court erred in allowing testimony showing that one of Doherty's co-conspirators improperly lowered the test scores of black applicants for police jobs.

6. Whether the district court improperly failed to submit the issue of the materiality of Barner's perjurious statements to the jury.

7. Whether Deliere's conviction for mail fraud was barred by the statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-55a)[1] is reported at 867 F.2d 47. The opinions of the

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[1] "Pet. App." references are to the appendix to the petition in No. 88-1623.

district court are reported at 675 F. Supp. 712, 675 F. Supp. 714, 675 F. Supp. 719, and 675 F. Supp. 726.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1989. A petition for rehearing was denied on March 16, 1989. The petitions for a writ of certiorari in Nos. 88-1623, 88-6952, and 88-6953 were filed on April 1, 1989. The petition in No. 88-7249 was filed on May 19, 1989, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner Doherty was convicted on two counts of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(c); he was sentenced to 20 years' imprisonment and a $35,000 fine. Petitioner Deliere was convicted of conspiracy to commit mail fraud; he was sentenced to four years' imprisonment. Petitioner Salerno was convicted of conspiracy to commit mail fraud; he was sentenced to five years' imprisonment and a $10,000 fine. Petitioner Barner was convicted of perjury, in violation of 18 U.S.C. 1623; he was sentenced to four years' imprisonment. The court of appeals affirmed. Pet. App. 1a-55a.

1. The evidence at trial showed that three of the four petitioners – Thomas Doherty, John Deliere, and Nelson Barner – were among a group of Boston policemen who, between 1978 and 1984, participated in a conspiracy to steal copies of civil service examinations and

sell them to police officers seeking promotions. Doherty and Gerald Clemente, who pleaded guilty and testified for the government, stole the exams from the offices of the Massachusetts Department of Personnel Administration (MDPA). They normally charged $3,000 for a copy of an exam and split the money. Barner and Deliere were among the police officers who obtained stolen exams from Clemente and Doherty. Barner was subsequently promoted to police captain, and Deliere became the Revere police chief. In addition, Barner helped Clemente research answers to stolen exams. The fourth petitioner, Nicholas Salerno, was a state legislative aide who obtained stolen exams at $3,000 each from Clemente for resale to police officers. Pet. App. 6a-10a.

The mail fraud counts in the indictment alleged that petitioners had devised a scheme to defraud the citizens of Massachusetts of their right to the honest, loyal, and faithful services of certain police officers. Such "intangible rights" allegations are concededly improper under *McNally* v. *United States*, 483 U.S. 350 (1987), where this Court held that the federal fraud statutes did not reach schemes to deprive citizens of the intangible right to honest government. Like the indictment, the jury instructions contained intangible rights language that is erroneous under *McNally*. Pet. App. 20a. Following their convictions (which were obtained before *McNally* was announced), petitioners moved for a new trial on the ground that their convictions were invalid in light of *McNally*. The district court denied the motions, except as to Barner, reasoning that the defects in the indictment and the jury

instructions constituted harmless error with respect to the other petitioners. 675 F. Supp. 726, 730-737.[2]

2. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-55a. It first held that the indictment stated an offense even without reference to the intangible rights language. The court noted that the indictment repeatedly stated that an objective of the conspiracy was to obtain, for persons purchasing the exams, a "salary or increased salary by reason of appointment to or promotion within the police department and whatever pension benefits would accrue by reason of the appointment to or promotion within the police department." *Id.* at 16a; see also *id.* at 17a. The court added that the intangible rights language in the indictment did not affect petitioners' preparation for trial. *Id.* at 18a.

The court of appeals next concluded that the inclusion of intangible rights language in the jury instructions was harmless beyond a reasonable doubt. The court reasoned that it was "virtually inconceivable that the jury could have found [petitioners] guilty of conspiracy to commit mail fraud without believing that they were conspiring to deprive the Commonwealth of money, in the form of salary payments to improperly promoted officers." Pet. App. 22a. The court also rejected each of petition-

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[2] The court of appeals explained that the jury might have convicted Barner, who helped research answers to stolen exams, solely on the theory that he intended to corrupt the police promotion system. The district court therefore granted his motion for a new trial with respect to the mail fraud charges. Pet. App. 25a. The other petitioners' mail fraud convictions were upheld because they plainly conspired to obtain increased salary payments for buyers of the stolen exams.

ers' numerous other challenges to their convictions. *Id.* at 26a-55a.

ARGUMENT

1. Doherty (88-6952 Pet. 8-12), Deliere (88-1623 Pet. 8-10), and Salerno (88-7249 Pet. 16-18) contend that their conspiracy to commit mail fraud and racketeering convictions cannot stand in light of this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987). As an initial matter, their contention that the decision below cannot be squared with *McNally* is a matter of no continuing importance. Congress recently amended the mail and wire fraud statutes to provide that a "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right to honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508 (Nov. 18, 1988). The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Thus, although petitioners' convictions must be judged under the mail fraud statute as construed in *McNally*, their convictions would plainly be valid under current law. Review by this Court is therefore not warranted.

Furthermore, the decision below is consistent with *McNally*. In *Carpenter* v. *United States*, 108 S. Ct. 316 (1987), this Court upheld the wire fraud conviction of the writer of a column for the Wall Street Journal who traded on his knowledge of what the column would say. The Court made clear that a scheme to defraud does not require proof that the victim of the scheme lost money,

but only requires that the scheme contemplated that the victim would be deprived of a property interest of some kind. 108 S. Ct. at 321. Here, petitioners' scheme deprived the Commonwealth of Massachusetts of the services of the best qualified police officers in senior leadership positions; that is because some officers obtained their positions not because they were best qualified, but because they cheated by making use of petitioners' services. The Commonwealth's important personnel interest constitutes a property right at least as readily cognizable as the interest at issue in *Carpenter* – the Wall Street Journal's right to exclusive control over the information it would publish.

In addition, the court of appeals properly examined the erroneous jury instructions to determine whether the inclusion of intangible rights language was harmless error. This Court has repeatedly held that an erroneous jury instruction, even on an essential element of an offense, must be tested for harmless error, and that a conviction will be upheld if the error was harmless beyond a reasonable doubt. See *Pope* v. *Illinois*, 481 U.S. 497, 502 (1987); *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). The decision below is consistent with the rule in the Seventh Circuit, which also evaluated an erroneous intangible rights jury instruction under the harmless error rule. See *Moore* v. *United States*, 865 F.2d 149, 153-154 (7th Cir. 1989).[3]

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[3] No court has held that harmless error analysis is inappropriate in a case of this sort. Contrary to Deliere (88-1623 Pet. 9), the Eighth Circuit merely held in *United States* v. *Slay*, 858 F.2d 1310, 1315-1316 (1988), that the error in instructing the jury on intangible rights fraud was not harmless under the facts of that case. Nor, contrary to Salerno (88-7249 Pet. 17), does the decision below

The court of appeals also correctly determined that the erroneous jury instructions were harmless under the facts of this case. As the court stated, it is inconceivable that "a jury *believing* the government's account of the scheme to the extent of finding these [defendants] guilty, could, at the same time, have *not* believed that an object of the conspiracies was to obtain promotions and raises." Pet. App. 22a. The tangible property the conspirators desired necessarily followed from their scheme to corrupt the MDPA's promotion system.

2. Doherty (88-6952 Pet. 16-17) and Salerno (88-7249 Pet. 11-16) contend that their mail fraud convictions must be overturned because the government did not prove that the mails were used in furtherance of their scheme. The court of appeals rejected that contention because the government had "presented evidence of standard MDPA mailing practices, from which the jury could conclude that the MDPA mailed notices of promotion interviews to * * * many * * * officers to whom the conspirators provided exams; that it would not have mailed these notices to these people, had the defendants not dishonestly bought or sold exams; and that receipt of these notices was a necessary step towards obtaining the promotions the defendants sought." Pet. App. 37a.

The court of appeals correctly rejected this fact-bound claim. The offense of conspiracy to commit mail

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establish an intracircuit conflict with *United States* v. *Ochs*, 842 F.2d 515 (1st Cir. 1988). The court in *Ochs* held only that the defendants' mail fraud convictions had to be reversed in light of *McNally* on the facts of that case. The court below carefully distinguished this case from *Ochs* (Pet. App. 24a-25a). In any event, an intracircuit conflict does not warrant this Court's attention.

fraud requires proof that the conspirators agreed to use the federal mails to execute the fraud. *Pereira* v. *United States*, 347 U.S. 1, 11 (1954). The use of the mails, however, need not be an essential element of the scheme; it is sufficient if the use of the mails is incident to an essential part of the scheme. *Schmuck* v. *United States*, 109 S. Ct. 1443, 1447 (1989). Moreover, the mailings themselves can be routine or innocent; there is no requirement that they contain false or misleading information. *Id.* at 1449.

In this case, the mailings of the notice of promotion interviews to petitioners and other policemen to whom petitioners had provided exams satisfied the "use of the mails" element of the offense of mail fraud. An object of petitioners' scheme was to obtain promotions to higher rank in the police force. As noted by the court of appeals, the mailings furthered that scheme because the Commonwealth "would not have mailed these notices to these people, had [petitioners] not dishonestly bought or sold exams, and * * * receipt of these notices was a necessary step towards obtaining the promotions the [petitioners] sought." Pet. App. 37a.

3. Doherty maintains (88-6952 Pet. 13-16) that the evidence does not support his racketeering conviction. Specifically, he argues that the government failed to prove that an enterprise existed, that petitioners' predicate acts were performed in furtherance of the enterprise, and that the crimes had a sufficient nexus with interstate commerce. None of these fact-bound claims merits review.

The court of appeals correctly concluded that an enterprise existed and that the government established that Doherty acted in furtherance of the enterprise. A racketeering enterprise is defined as "any individual,

partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). The existence of an enterprise is normally proved by evidence of an "ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). The evidence in this case met that standard. As the court of appeals stated, "[t]he government charged, and introduced evidence of, two entries of the MDPA's offices, ten efforts to obtain exams, thirteen instances of providing exams to applicants, as well as various acts of possessing exams, making answer sheets, changing scores, causing MDPA mailings concerning exams, and taking exams with illegal assistance. * * * The number of acts, their relationship, their having taken place over several years, and the consistent participation of the central figures in the scheme show a 'group of persons associated together for a common purpose of engaging in a [criminal] course of conduct.'" Pet. App. 44a (quoting *United States* v. *Turkette*, 452 U.S. at 583).

In addition, the government proved a sufficient nexus between the enterprise and interstate commerce. The required nexus need only be minimal. See *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985); *United States* v. *Robinson*, 763 F.2d 778, 781 (6th Cir. 1985). Here, as the court of appeals explained, the evidence showed that petitioners' "activities may have prevented out-of-state applicants from obtaining jobs (seventy out-of-state applicants participated in one 1983 exam), thereby affecting the interstate labor market; that the MDPA replaced its locks with locks ordered from Philadelphia [after learning of the break-ins]; and that an

out of state consultant developed and graded some exams." Pet. App. 45a.

4. Doherty contends (88-6952 Pet. 18-24) that the district court erred in admitting into evidence a copy of a promotion exam that was seized from his residence.

In 1984, one police officer shot another officer, in Doherty's presence, in a barn behind Doherty's house. Pet. App. 9a-10a. Following the shooting, law enforcement officers obtained a search warrant authorizing them to search Doherty's barn for "blood, physiological fluids, hair, fibers, shotgun wadding, shotgun pellets, shotgun shells, a handgun and ammunition, a shotgun and ammunition, 'speedy dry.'" During the search, an officer opened a manila envelope he found in the barn and tipped it to determine whether the envelope contained any of the items sought in the search warrant. The officer discovered a copy of an exam, which he recognized because it contained a control number on the corner of the document. The officer showed the exam to several other officers, some of whom knew that Doherty was suspected of stealing exams. They looked at the last page of the exam, which stated that it had to be turned in after it was given, and then seized it. *Id.* at 38a-39a.

At trial, the district court admitted the copy of the exam into evidence on the ground that it was seized in plain view. The court of appeals affirmed. It noted that "a 'plain view' seizure is lawful if (1) the seizing officer has a prior justification for being in a position to see the item in plain view; (2) the discovery of the item is inadvertent; and (3) the evidentiary value of the item is immediately apparent to the officer." Pet. App. 39a; see *Arizona* v. *Hicks*, 480 U.S. 321, 326 (1987); *Texas* v. *Brown*, 460 U.S. 730, 738-744 (1983). Doherty did not challenge the introduction of the evidence on the first

two grounds. 88-6952 Pet. 21. Instead, he argued only that the evidentiary nature of the exam was not immediately apparent to the officers. The court of appeals correctly rejected that claim, since "[t]hey had personal experience with exams, they had suspicions about [Doherty], and they knew that officers were not allowed to have exams at home." Pet. App. 40a.[4]

5. Doherty also maintains (88-6952 Pet. 17-18) that the district court erred in allowing Barner to elicit from Clemente on cross-examination that on one occasion, after breaking into the MDPA's offices with Doherty, Clemente had lowered the scores on the exams of several black applicants whom he did not like. But the district court's ruling was not an abuse of discretion because, as the court of appeals stated (Pet. App. 42a), there was no suggestion that Doherty participated in that activity. Accordingly, Doherty was not unduly prejudiced by the testimony. See Fed. R. Evid. 403. In any event, that fact-bound question does not warrant further review.

6. Barner, who was convicted of perjury, contends (88-6953 Pet. 7-11) that the district court erred by refusing to submit to the jury the issue of the materiality of his false statements. As an initial matter, as the court of appeals concluded (Pet. App. 48a), the district court did

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[4] There is no merit to Doherty's belated complaint (88-6952 Pet. 20-21) that the method of executing the warrant was unreasonable. Inasmuch as the officers were validly in the barn on the authority of the warrant to look for shotgun shells and bullets, they were entitled to examine the manila envelope for those items. See *United States* v. *Ross*, 456 U.S. 798, 820-821 (1982) (lawful search of premises extends to entire area where the object of the search may be found).

not expressly refuse to submit the issue to the jury. Rather, it instructed the jury on materiality in its initial charge, but failed to mention it in the final charge.

In any event, this Court held in *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), that the question of "the materiality of what is falsely sworn, when an element in the crime of perjury, is one for the court." This Court has subsequently reaffirmed *Sinclair*. See *Kungys* v. *United States*, 108 S. Ct. 1537, 1547 (1988) (8 U.S.C. 1451(a) naturalization proceeding); *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962).[5] The courts of appeals have uniformly followed *Sinclair*'s rule in prosecutions under 18 U.S.C. 1623, the statute Barner was convicted of violating. *United States* v. *Watson*, 623 F.2d 1198, 1201 (7th Cir. 1980); *United States* v. *Richardson*, 596 F.2d 157, 165 (6th Cir. 1979). See also *United States* v. *Vitello*, 425 F.2d 416, 423-424 (9th Cir.), cert. denied, 400 U.S. 822 (1970).[6] Thus, the district court did not err

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[5] Barner's assertion (88-6953 Pet. 10-11) that *In re Winship*, 397 U.S. 358 (1970), overruled *Sinclair* is meritless. In *Winship*, this Court held that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime" charged. *Id.* at 364. That standard applies to questions of fact; it has no application to questions of law.

[6] Barner relies heavily (88-6953 Pet. 7-9) on *United States* v. *Taylor*, 693 F. Supp. 828 (N.D. Cal. 1988), where the district court issued a pretrial order in which it held that it would submit the issue of the materiality of a false statement to the jury. But unless and until the Ninth Circuit agrees with the district court's decision, there is no reason for this Court to review the decision below, since it presents, at most, a conflict between a decision of a court of appeals and decision of a district court.

by failing to instruct the jury on materiality in its final charge.

Contrary to Barner's suggestion (88-6953 Pet. 9-10, 11), there is no reason to hold this case pending the decision in *Carella* v. *California*, No. 87-6997 (argued Apr. 26, 1989). That case involves the validity of a statutory presumption that a lessee who failed to return personal property on demand intended to steal the property. This case involves no question of intent, but rather a question of materiality. Whether a defendant *intended* to commit a crime is usually an intensely factual question, while, as Barner acknowledges (88-6953 Pet. 7), "[t]he nearly universal rule has been that proof of materiality, in a trial of a perjury indictment, is a question of law to be decided by the trial court and not by the jury." Accordingly, the decision in *Carella* is not likely to have any bearing on this case. Moreover, there is no reason to reconsider the "nearly universal rule" Barner challenges.

7. Deliere contends (88-1623 Pet. 4-7) that his conspiracy conviction cannot stand under the applicable five-year statute of limitations, 18 U.S.C. 3282. There is no basis for his claim that the government did not allege and prove an act in furtherance of the conspiracy within five years of the indictment.

The indictment was returned in July 1986. Accordingly, the government was required to prove that at least one overt act in furtherance of the conspiracy occurred after July 1981. See *Grunewald* v. *United States*, 353 U.S. 391, 396-397 (1957). As the court of appeals stated (Pet. App. 31a), the indictment alleged that Clemente provided an exam to Deliere in 1979, so that he would be promoted to chief of police in Revere, "in return for services and favors" from Deliere. The evidence showed that after Deliere became the chief of police, he issued orders

in 1982 that helped Clemente's girlfriend obtain more bail bond business. *Ibid.* Thus, the proof showed that Deliere performed acts in furtherance of the conspiratorial agreement within five years of the date of the indictment.[7]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Deliere's reliance (88-1623 Pet. 6) on *United States* v. *Davis*, 533 F.2d 921 (5th Cir. 1976), is misplaced. In that case the government alleged a conspiracy to make false statements to the Department of Labor in violation of 18 U.S.C. 1001, but the government neither alleged nor showed that any false statement had been made within five years of the indictment. 533 F.2d at 927. The court rejected the government's argument that the conspiracy continued into the five-year period, because the defendants never corrected their false statements. *Id.* at 928. Here, in contrast, the government alleged that, as part of the conspiracy, Deliere agreed to provide favors to Clemente and showed that, in fact, he did so within five years of the date of the indictment.

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